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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-5969

EDDIE LEE MILLER, PETITIONER

VS.

STATE OF ARKANSAS, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT
IN OPPOSITION TO PETITION

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ON PETITION FOR WRIT OF CERTIORARI TO THE
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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

Respondent, State of Arkansas, responds to petitioner's petition for writ of certiorari to the Supreme Court of Arkansas.

QUESTION PRESENTED FOR REVIEW

Whether the aggravating circumstances found in this case exist beyond a reasonable doubt and justify a sentence of death beyond a reasonable doubt.

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OPINIONS BELOW

The opinion of the Arkansas Supreme Court affirming petitioner's conviction is found at 270 Ark. Adv. Sh. 341, ____ S.W.2d ____ (Substitute opinion on rehearing, October 6, 1980). The opinion, in slip form, is reproduced in the appendix to the petition at A-1.

JURISDICTION

The petitioner has adequately set forth the grounds for jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The petitioner has adequately set forth the constitutional and statutory provisions involved.

STATEMENT OF THE CASE

The petitioner has adequately set forth the facts of the case.

REASONS FOR DENYING THE WRIT

1. THE AGGRAVATING CIRCUMSTANCES FOUND IN THIS CASE EXIST BEYOND A REASONABLE DOUBT AND JUSTIFY A SENTENCE OF DEATH BEYOND A REASONABLE DOUBT.

In Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed2d 346 (1972), this Court condemned the death penalty as applied in Georgia and by implication in other states as well, as violative of the Eighth Amendment.

> "Because of the uniqueness of the death penalty, Furman held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner."

Gregg v. Georgia, 428 U.S. 153, 188 (1976).

In order that the death penalty in Arkansas might comport with the Constitution, the General Assembly enacted Act 438 of 1973. This Act set forth mandatory procedures to insure that the death penalty would not, in the words of Furman, be "freakishly or wantonly" imposed. The Act called for a bifurcated trial and enumerated the factors in aggravation and mitigation which the jury must find in writing, justifying their finding, before the death penalty could be imposed. The legislature obviously felt that by setting forth these requirements, not only would they insure that the death penalty was not "freakishly or wantonly" imposed by the jury, but also that there would be a greater opportunity for a meaningful review of the jury's findings on appeal.

The Arkansas Supreme Court held Act 438 to be constitutional in Collins v. State, 259 Ark. 9, 531 S.W.2d 13 (1975), and Neal v. State, 259 Ark. 27, 531 S.W.2d 17 (1975). In a trilogy of cases, this Court gave approval to the method of imposing the death penalty not unlike those in Arkansas. Gregg v. Georgia, supra; Proffitt v. Florida, 428 U.S. 242, 913 (1976); Jurek v. Texas, 428 U.S. 262 (1976).

In Gregg, supra, this Court gave its approval to sentencing provisions similar to those used at petitioner's trial. 428 U.S. at 163. This Court stated the constitutional benchmark as follows:

> Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and

risk of wholly arbitrary and capricious action.

(Emphasis added). 428 U.S. at 189.

> To the extent that this problem is inherent in jury sentencing, it may not be totally correctible. It seems clear, however, that the problem will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision.

(Emphasis added). 428 U.S. at 192.

> In summary, the concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

(Emphasis added). 428 U.S. at 195.

The Florida statute, also similar to the Arkansas statute, was approved in Proffitt, supra, 428 U.S. at 248. There this Court stated:

> On their face these procedures, like those used in Georgia, appear to meet the constitutional deficiencies identified in Furman. The sentencing authority in Florida, the trial judge, is directed to weigh eight aggravating factors to determine whether the death penalty shall be imposed. This determination requires the trial judge to focus on the circumstances of the crime and the character of the individual defendant. He must, inter alia, consider whether the defendant has a prior criminal record, whether the defendant acted under duress or under the influence of extreme mental or emotional disturbance, whether the defendant's role in the crime was that of a minor accomplice, and whether the defendant's youth argues in favor of a more lenient sentence than might otherwise be imposed. The trial judge must also determine whether the crime was committed in the course of one of several enumerated felonies, whether it was committed for pecuniary gain, whether it was committed to assist in an escape from custody or to prevent a lawful arrest, and whether the crime was especially heinous, atrocious, or cruel. To answer these questions, which are not unlike those considered by a Georgia sentencing jury, see Gregg v. Georgia, at 197, 49 L.Ed.2d 859, 96 S.Ct. 2909, the sentencing judge must focus on the individual circumstances of each homicide and each defendant.

(Emphasis added). 428 U.S. at 252. See also Jurek, supra, 428 U.S. at 267. The sentencing guidelines are required to

serve two distinct purposes, i.e. to focus jury discretion at the time of sentencing and to provide adequate appellate review of sentencing decision.

The Arkansas Supreme Court reviewed Act 438 in light of Gregg, Proffitt, and Jurek, supra, and found the Arkansas procedures to be constitutional. Collins v. State, 261 Ark. 195, 548 S.W.2d 106 (1977), cert. den. 434 U.S. 878 (1977); Neal v. State, 261 Ark. 336, 548 S.W.2d 135 (1977), cert. den. 434 U.S. 878 (1977).

In the present case, the exercise of the jury's discretion, in sentencing petitioner to death, fully comported with the above mentioned case law. The jury found four (4) of the seven (7) statutory aggravating circumstances to exist beyond a reasonable doubt. The jury found none of the statutory mitigating circumstances to exist; nor did the jury find any mitigating factors, in addition to those listed in the statute. The jury concluded that; one or more of the aggravating circumstances existed beyond a reasonable doubt; the aggravating circumstnaces outweighted beyond a reasonable doubt any mitigating circumstances; and the aggravating circumstances justified beyond a reasonable doubt, the sentence of death.

In the instant petition, it is argued that two of the aggravating circumstances found were not supported by the evidence and that petitioner's sentence is therefore unconstitutional.

In Miller v. State, 270 Ark. 341, (Substitute opinion on rehearing, October 6, 1980) the Supreme Court noted:

> The aggravating and mitigating circumstances to be considered by the jury in all applicable cases are set out in the statute and are therefore not worded or tailored to fit the particular facts of the case just tried. As the statute does not indicate otherwise, the circuit judges of the state have been submitting to the jury in capital murder cases all seven of the enumerated aggravating circumstances and all six of the enumerated mitigating circumstances, regardless of the inapplicability of some of them. Ark. Stat. Ann. §41-1303 (Repl. 1977). The practice was perhaps also bolstered by our Committee on Criminal Jury Instructions, because none of the aggravating or mitigating circumstances are bracketed in the model instruction, to indicate they might be omitted. We think it a better practice, and less confusing to the jury, for the circuit judge to omit from submission any aggravating or mitigat-

> ing circumstances that are completely unsupported by any evidence, and we take this opportunity to direct the circuit judges of Arkansas to hereafter follow this alternate procedure. If there is any evidence of the aggravating or mitigating circumstances, however slight, the matter should be submitted to the jury. Of course, counsel may object to the determination of the trial court the same as they may object to any other form of verdict.

(Emphasis added). 270 Ark. at 354.

Respondent therefore submits that petitioner's sentencing jury properly considered all the statutory aggravating and mitigating circumstances. Respondent further submits that there is support in the evidence at trial for all four aggravating circumstances found to exist in petitioner's case.

The aggravating circumstances found by the jury are as follows:

> I. The defendant had, beyond a reasonable doubt, previously committed another felony an element of which was the use or threat of violence to another person or creating a substantial risk of death or serious physical injury to another person.
>
> II. The defendant did, beyond a reasonable doubt, in the commission of the capital felony murder knowingly create a great risk of death to a person other than the victim.
>
> III. The defendant did, beyond a reasonable doubt, commit the capital felony murder for the purpose of avoiding or preventing an arrest or effecting an escape from custody.
>
> IV. The defendant did, beyond a reasonable doubt, commit the capital felony murder for pecuniary gain.

The two aggravating circumstances allegedly unsupported by the evidence are:

> II. The defendant did, beyond a reasonable doubt, in the commission of the capital felony murder knowingly create a great risk of death to a person other than the victim.
>
> III. The defendant did, beyond a reasonable doubt, commit the capital felony murder for the purpose of avoiding or preventing an arrest or effecting an escape from custody.

There is evidence to support these findings when the evidence is viewed in the light most favorable to appellee as it must be on appeal, Ruiz & Denton v. State, 265 Ark. 875, 897, 482 S.W.2d 915 (1979); Westbrook v. State, 265 Ark. 736, 749, 580 S.W.2d 702 (1979); Neal v. State, 259 Ark. 27, 34, 531 S.W.2d 17 (1975); vacated, other

grounds, 429 U.S. 808 (1976), reinstated, 261 Ark. 336, 548 S.W.2d 135 (1977), cert. den., 434 U.S. 878 (1978), Cf. Swindler v. State, 267 Ark. 418, 434, 592 S.W.2d 91 (1979); Hulsey v. State, 261 Ark. 449, 466, 549 S.W.2d 73 (1977), cert. den., 439 U.S. 882 (1978).

Petitioner contends that the Arkansas Supreme Court approved a jury finding on less than substantial evidence that he "did, beyond a reasonable doubt, in the commission of the capital murder, knowingly create a great risk of death to a person other than the victim."

The petitioner states that there was no evidence presented to justify the jury's finding. In so stating, however, he seems to neglect to remember that in his own handwritten confession, he said that after he had shot the victim and had gotten the money, a man came to the door of the store and petitioner told him to come in. (T. 690-692, 948)

In the taped interview, petitioner spoke of the reason that he shot the victim, Mr. Bolin, four times:

> Q. And just leave him sitting there?
>
> A. And just leave him or just leave him just sitting there, you know, and by the time I got out the door I knowed he was going to call the police or something, you know, and - and I'd been, you know, gone and it been at least you know, you'd been described you know, I know I probably got described but it probably the first time he'd seen me in there. And I was just going to take my chances, you know, or just, you know, get the money and just go on, you know. (T. 688-689)

The petitioner also said that after having shot the victim, he then grabbed the cash box and as he did, a man, Mr. Hudson, came in the door. (T. 680) The petitioner seems to have also forgotten that Mr. Hudson testified that, upon hearing shots, he ran to the victim's store and opened the door. (T. 551, 552) Mr. Hudson testified that at that moment, the appellant was right there in Hudson's face holding what he knew to be victim's cash box. (T. 552, 553) Mr. Hudson than testified:

> A. And at that point the guy made a move like this (indicating) and then he said, "You get in here." Well, I backed out the door. And it was a brick building. I knew that if I got behind the door facing, the brick, then I would be safe.

So I backed out around the door. That put me between Main Street, Mr. Bolin's front door and his side door. I didn't know which (T. 553) way he was coming out so I tried to divide the distance between the front door and the back door or the side door.

Q. Were you staying up near the building?

A. I was standing close to the building. I saw some cars, two cars out on the street and I thought about getting under or getting behind one of those, but I realized that it would have put me visible from either door, the front or the side door. So I stood there shaking. And I stood there until the guy came out. He came out the side door which I went in.

Q. Now, that is the door on Second Street?

A. The door facing Second Street. And at the time that I saw him, he had already turned to go down the other way toward the alley.

Q. Turned away from you going towards the police station?

A. Away from me going towards the police station. Well, he had the gun or he had a gun in his hand. It was more down to his side. He was glancing from side to side as he went towards the alley. I would say approximately half way between the door that he came out of and the alley he then stuck the gun in front, apparently in his belt or in his clothes. And then he run. And then he turned up the alley. So I went in. (T. 554)

In considering this identical issue on direct appeal, the Arkansas Supreme Court observed that:

> The testimony relevant to a finding that appellant knowingly created a great risk of death to a person other than the victim was the testimony of Jim Hudson. Mr. Hudson, whose business was next to that of the deceased, testified that after hearing several shots and his neighbor's voice say "No, no!" followed by more shots, he entered the victim's premises and came face to face with appellant. He testified appellant said,"You get in here," but instead he backed out of the door and stood outside hiding and shaking until he saw appellant exit with a gun in his hand and run up the alley. The jury could reasonably have found on substantial evidence that appellant knowingly created a great risk of death to Mr. Hudson when he tried to get him inside the store. Having just murdered one man, it is not difficult to believe that appellant would have just as easily dispatched of Mr. Hudson to avoid leaving a witness to identify him. (Emphasis added).

Miller v. State, 270 Ark. at 355.

Petitioner also asserts that there was less than substantial evidence to support a finding "beyond a reasonable doubt that this capital murder was committed for the purpose of avoiding or preventing an arrest or effecting an escape from custody."

The relevant evidence in this regard, as noted above, was petitioner's statement that:

> "I was just intending to get the money and go...and by the time I got out the door I knowed he was going to call the police or something you know, and - and I'd been, you know, gone and it had been at least, you know, you'd been described, you know, I know I probably got described but it probably the first time he's seen me in there and I was just going to take my chances, you know, or just, you know, get the money and just go on, you know." (T. 688, 689)

There was also testimony from Mr. Hudson, the barber, that as he Hudson, retreated, he saw the appellant come out of the door, move down the alley, glancing from side to side, and finally tuck his gun in his belt. (T. 554)

On review of this contested aggravating circumstance, the Arkansas Supreme Court determined that:

> The evidence presented on the question of whether or not appellant killed the deceased for the purpose of avoiding arrest primarily consists of certain relevant portions of his confession. It is obvious from the jury's finding that they believed appellant shot Bolin to remove him as a possible witness. They did not interpret the aggravating circumstances to be applicable only to capital felony murder committed by a defendant while he is attempting to escape from custody -- an interpretation we cannot say is erroneous. Appellant stated that, immediately prior to the shooting, thoughts of being identified by the deceased ran through his mind. Although the remainder of this passage is somewhat hard to follow, it is inescapable that appellant was concerned about being identified by the deceased. Appellant stated in his confession that the deceased reached for an iron pipe and that was why he shot him, but investigation at the scene uncovered no iron pipe or any similar object. The jury could also take into consideration the lack of any other logical reason for the killing, such as revenge or accident. Once again, we think there was sufficient evidence for the jury to find beyond a reasonable doubt that appellant killed the deceased to eliminate a witness and thus hopefully avoid arrest for the robbery.

Miller v. State, 270 Ark. at 356.

In light of all of this, it is very easy to get the justification of the jury's finding there. Certainly, when the evidence is viewed in the light most favorable to the appellee, as it must be on appeal, Ruiz & Denton v. State, 265 Ark. 875, 897, (1979) 482 S.W.2d 915 (1979); Westbrook v. State, 265 Ark. 736, 749, 580 S.W.2d 702 (1979); Neal v. State, 259 Ark. 27, 34, 531 S.W.2d 17 (1975), vacated other grounds, 429 U.S. 808 (1976), reinstated, 261 Ark. 336, 548 S.W.2d 135 (1977), cert, den., 434 U.S. 878 (1978), the evidence was sufficient to support the jury's finding. Cf. Swindler v. State, 267 Ark. 418, 434, 592 S.W.2d 91 (1979); Hulsey v. State, 261 Ark. 449, 466, 549 S.W.2d 73 (1977), cert. den., 439 U.S. 882 (1978).

Each aggravating circumstance had a separate evidentiary base. Here it cannot be said that an aggravating circumstance is not established by any evidence. As this Court stated in Jackson v. Virginia 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), in a criminal case, the test of substantiality must be:

> " Whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

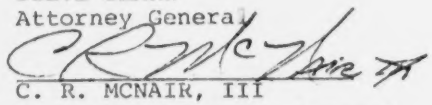
Viewing all the aggravating circumstances found by the jury, as compared with the lack of mitigating circumstances, it is evidence that petitioner's death sentence was not capriciously, wantonly or freakishly imposed.

CONCLUSION

Respondent would thus submit that the aggravating circumstances found in this case exist beyond a reasonable doubt and justify a sentence of death beyond a reasonable doubt. The petition should therefore be denied.

Respectfully submitted,

STEVE CLARK
Attorney General

By: 

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